Nos. 80-11 and 80-15

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In the Supreme Court of the United States

OCTOBER TERM, 1979

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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At issue in this case is the validity of an ordinance of the Jicarilla Apache Tribe imposing a severance tax on the extraction of oil and gas from tribal lands within its Reservation (80-15 Pet. App. 1n-6n), an area set apart and defined by a series of Executive Orders between 1874 and 1912 (*id.* at 11-61). The Tribe's mineral lessees challenged the ordinance and the United States District Court for the District of New Mexico struck down the

tribal tax on a variety of grounds (*id.* at 1c-8c). The court apparently believed that the Tribe never enjoyed the power to tax non-members, whether before or after the Indian Reorganization Act of 1934 (*id.* at 7c-8c). At all events, the district court concluded that, by enacting 25 U.S.C. 398c in 1927 (*id.* at 1h-2h), Congress granted the States exclusive authority to tax the severance of oil and gas on Reservations established by Executive Order (*id.* at 7c). And, finally, the tribal ordinance was held to impose "an unlawful multiple burden on interstate commerce" and unconstitutionally to discriminate against that commerce (*ibid.*). Addressing each of these questions, the court of appeals, sitting en banc, reversed (*id.* at 1a-30a), two judges dissenting (*id.* at 30a-41a, 41a-64a). Rehearing was denied (*id.* at 1b-2b).

In our view, the decision of the court of appeals is plainly correct and does not merit review here. That would not have been so clear but for this Court's intervening decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980). In the light of that ruling, however, the instant case presents no seriously arguable question of general importance not already authoritatively settled.

1. In *Colville* this Court expressly held that Indian Tribes generally retain as "a fundamental attribute of sovereignty" the power to tax non-Indians in respect of transactions occurring on their lands and "significantly involving [the] tribe or its members." Slip op. 15. That principle was there applied to sales of cigarettes imported from out-of-state and sold primarily to outsiders in circumstances which led the Court to observe that it was "painfully apparent that the value marketed by the smokeshops * * * is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 18. It hardly requires argument to conclude that, unless Congress has otherwise decreed, the tribal power of

taxation also survives in respect of extraction of a vital natural resource of the Reservation—an activity far more intimately associated with the Indian land situs and more immediately implicating tribal interests.

2. It would be frivolous to suggest that the Jicarilla Apache Tribe lacks the power of taxation, or enjoys a lesser prerogative, because its present Reservation was established by Executive Order. To be sure, this Court has held that lands temporarily set aside for Indians without benefit of a treaty or Act of Congress could be returned to the public domain without any obligation under the Fifth Amendment to pay just compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Ute Indians* v. *United States*, 330 U.S. 169 (1947). See also *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103-110 (1949). But it hardly follows that a Tribe enjoying an Executive Order Reservation has no interest in the land or natural resources within those boundaries, even after almost a century of continuous possession has elapsed. There are today no "temporary" Indian Reservations. Congress ended the creation of new Indian Reservations by the Executive in 1918 and 1919 (25 U.S.C. 211; 43 U.S.C. 150), and, more importantly, since 1927, the President has been forbidden to abolish or diminish Indian Reservations so created. 25 U.S.C. 398d. For several decades, at least, it has been accepted that, unless it is expressly provided otherwise in the instrument creating the Reservation or in a later Act of Congress, every Tribe is entitled to enjoy comparable benefits from the timber, the minerals, and the waters of its Reservation, regardless of the method by which it was established. In many instances, that understanding is reflected in federal legislation. *E.g.*, 25 U.S.C. 398b-398c, 407, 461. And this Court has indicated the same view. See, *e.g.*, *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941); *Metlakatla Indians* v. *Egan*, 369 U.S. 45, 58-59 (1962);

Arizona v. *California*, 373 U.S. 546, 596-598 (1963). Cf. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 1-4, 10-11; *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 8-13.

At all events, there is no basis whatever for distinguishing between the residual sovereignty of Tribes whose lands were set apart by Executive action and others whose title is recognized by treaty or Act of Congress. Since tribal sovereignty is a residuum of aboriginal independence, and not a grant from the United States, it cannot vary according as the National sovereign has defined an Indian Reservation by one means rather than another. See *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). The recent *Colville* decision has settled that the tribal power to tax is an aspect of that residual sovereignty. Slip op. 15-17. Indeed, by expressly recognizing the authority of the Colville Tribes to tax activities on their Reservation, established by Executive Order (*id.* at 6 n.12), as no less than the similar power of the Lummi and Makah Tribes, whose Reservations were created by formal treaties (*id.* at 6 nn. 13 & 14), the Court has foreclosed the argument.

3. Although it is plain that the Jicarilla Apache, like every other Tribe with a recognized territory, continued to enjoy the power to tax activities on their Reservation significantly touching tribal interests long after they came under the protection of the United States, we must consider the possibility that the Tribe was later "divested of [that power] by federal law." See *Colville*, *supra*, slip op. 15. We submit no such finding properly can be made here.

The suggestion appears to be that the Act of Mar. 3, 1927 (ch. 299, 44 Stat. 1347, 25 U.S.C. 398a-398c), by permitting State taxation of mineral production on Indian Reservations created by Executive Order, ousted any

tribal power to tax the same activity. But the argument proves too much. In all relevant respects, the 1927 Act merely makes applicable to Executive Order Reservations the leasing and taxing provisions already enacted in 1924 for Indian Reservations established by treaty or Congressionally ratified agreement.[1] See Act of May 29, 1924 (ch. 210, 43 Stat. 244; 25 U.S.C. 398). Thus, the rule suggested would disable almost all Indian Tribes from

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[1]The 1924 Act only applied to tribal lands "subject to lease for mining purposes * * * under the proviso to section 3 of the Act of February 28, 1891," which were there described as "lands * * * occupied by Indians who have bought and paid for the same." 26 Stat. 795; 25 U.S.C. 397. The Department of the Interior had construed this language as excluding reservations created by Executive Order, and, indeed, some established by Act of Congress where no consideration passing from the Indians was recited. See *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U.S. 159, 161-164 (1936); Solicitor's Memorandum of January 12, 1937, in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 714, 715 (1979). And the General Leasing Act (Act of Feb. 25, 1920, ch. 85, 41 Stat. 437), which authorized mineral leasing on lands "owned by the United States," did not apply to Executive Order reservations. 34 Op. Att'y. Gen. 181 (1924). Hence, the need for the 1927 Act. *British-American Oil Producing Co.*, *supra*, 299 U.S. at 162. Even then, there was believed to be no authority for mineral leasing of tribal lands in some congressionally established reservations not covered by the Indian Reorganization Act (see 25 U.S.C. 476-477). This, and the need to bring uniformity into the leasing of tribal lands, led to the passage of the comprehensive Act of May 11, 1938, ch. 198, 52 Stat. 347; 25 U.S.C. 396a-396g. (Other purposes of the Act were to bring leasing of tribal lands into harmony with the Indian Reorganization Act and to rectify the failure of existing law to give the Indians the greatest return from their property. S. Rep. No. 75-985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 75-1872, 75th Cong., 3d Sess. (1938)).

It was argued below that the 1938 statute superseded the 1924 and 1927 legislation and effectively repealed the earlier congressional consent to State taxation of Indian mineral production. See 84 I.D. 905. Because it concluded that the 1927 Act was not intended to divest the Indians of the power to impose a severance tax, and that such a tribal tax, even in addition to one levied by the State, did not constitute a multiple burden on interstate commerce, the court of

taxing mineral production, even when derived from assets unquestionally confirmed to them by solemn treaty. See *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938). We cannot assume that, without saying so, Congress intended such a result, effectively abrogating an essential power of self-government which the Nation had agreed to respect. Cf. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968). As the court of appeals found (80-15 Pet. App. 22a), nothing in the legislative history of the 1927 Act supports a different rule for Executive Order Reservations.

There is, moreover, no contradiction in removing a tax immunity while preserving the power to tax. Sufficient examples are the provisions of the Hayden-Cartwright Act (4 U.S.C. 104) and the Buck Act (4 U.S.C. 105-110) which permit State taxation of activities within other federal enclaves without affecting the concurrent power of the United States to impose its own like taxes. See 4 U.S.C. 108. Indeed, the 1924 and 1927 legislation affecting Indian Reservations belongs to the same philosophy of eliminating what was viewed as "tax favoritism." See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 610 (1943). In that day, both the Indians and their lessees were deemed exempt from State taxation on the basis of the federal instrumentality doctrine, which was not fully repudiated by this Court until two decades later. See *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342 (1949). In that setting, it seems obvious that the removal of a special exemption was not meant to disturb existing tribal powers. At all events, it would require much more than mere silence to justify imputing to

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appeals found it unnecessary to decide whether New Mexico's taxes are lawful, especially in the absence of the State as a party (80-15 Pet. App. 20a, 22a n.5). The question is not presented to this Court and we do not address it. For present purposes, we assume the taxing provision of the 1927 Act (25 U.S.C. 398c) remains effective.

Congress such a destructive intent. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

That there is no anomaly in the co-existence of State and tribal authority to tax the same transaction is of course confirmed by this Court's decision in *Colville*. Nor is it any longer arguable that any practical economic obstacle to burdening the taxpayer with both taxes invalidates either of them. It may be doubted whether petitioners, or their competitors, will in fact be deterred by the cumulative taxes. But the *Colville* case teaches us that even the total destruction of a business is irrelevant in determining taxability. There, the focus was on the State tax. Plainly, however, the same principle governs in assessing the tribal power to tax. Here, indeed, there is far more room for an accommodation, if the total tax burden proves excessive. In that event—absent Congressional intervention—it will be for the State and the Tribe to determine how best to tailor their taxes to their economic interest—a familar question of policy well beyond the jurisdiction of courts.

4. We notice, finally, the contention that the tribal tax offends the Commerce Clause because it unduly burdens, or discriminates against, interstate commerce. The charge is quickly answered.

At the outset, it may be doubted whether the Commerce Clause, any more than other provisions of the Constitution, controls the action of Indian Tribes. See *Talton* v. *Mayes*, 163 U.S. 376 (1896), re-affirmed in *United States* v. *Wheeler*, *supra*, 435 U.S. at 328-329. See, also, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 194 n.3 (1978). Thus, it presumably remains true that Tribes, unlike States, can close their borders to outsiders, see *Morris* v. *Hitchcook*, 194 U.S. 384, 393 (1904), notwithstanding the constitutional right of interstate travel which may be rooted in the Commerce Clause. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 630 n.8 (1969);

United States v. *Guest*, 383 U.S. 745, 758-759 (1966); *Edwards* v. *California*, 314 U.S. 160, 172-174, 177 (1941). So, also, we assume that, absent controlling Acts of Congress, an Indian Reservation government may ban or limit the importation or exportation of goods in circumstances forbidden to the States. Subject only to Interior Department approval, nothing prevents the Tribes themselves from enacting the same restrictive commercial code that federal legislation once imposed for their benefit, and, to some degree, maintains today. See 25 U.S.C. 81, 177, 251-264; *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *Central Machinery Co.* v. *Arizona State Tax Commission,* No. 78-1604 (June 27, 1980).

Certainly, the Indian Commerce Clause is no obstacle. To be sure, that provision, in some situations at least, operates as a restraint. See *Colville*, *supra*, slip op. 10-11, 20; *White Mountain Apache Tribe* v. *Bracker*, *supra*, slip op. 6-8. But it has never been suggested that the Indian Commerce Clause, of its own force, limits tribal powers that survived the submission of the Indians to federal authority. On the contrary, it shields the Tribes from undue State and local interference and permits the Congress to preempt white-Indian intercourse with protective, even preferential, regulation. See *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974); *United States* v. *Antelope*, 430 U.S. 641, 645-647, 649 n.11 (1977). The thrust of the Clause is to set Indian commerce apart for special regulation. It is not governed by the complex of rules developed under the Interstate Commerce Clause. See *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).

We need not press the point, however. Even if Indian Tribes, by necessary implication of their dependent status, are divested of the power unduly to interfere with the free

flow of interstate commerce, there is nothing of that kind in this case. The challenged tribal ordinance does not single out products destined for sale beyond New Mexico. Although, as it happens, most, but not all, of the oil and gas sold is transported out of state, that is a matter of complete indifference to the Tribe, whose severance tax applies indiscriminately whether or not the minerals leave New Mexico. The exemption for production taken and used by the Tribe as royalty in kind is, of course, not a preference for intrastate sales. In effect, the Tribe, being both owner and taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other. There is thus no arguable discrimination against interstate commerce.[2]

Nor does the tribal ordinance impose any impermissible multiple burden on interstate commerce. Once again, the *Colville* decision forecloses any objection. The Tribe is taxing a local event—severance—occurring wholly within the Reservation. The anomaly here is that the State is (we assume, *arguendo*) permitted to tax the same activity. But for express Congressional authorization (which may long since have been repealed, see note 1, *supra*), that intrusion would be barred under the principles recognized in *White Mountain Apache Tribe* and *Central Machinery Co.*, *supra*. In these circumstances, the Tribe can hardly be found guilty of unwarranted double taxation.

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[2]Nor is there any discrimination as between producers subject to the Tribe's jurisdiction. The tax applies to any operator extracting oil and gas on the Reservation, including tribal members (80-15 Pet. App. 17a).

For these reasons, we urge denial of the petitions for a writ of certiorari.

Respectfully submitted.

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